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EU Antitrust Law

Regulating Big Tech: The Draft EU Platform and Online Content Legislation Reveals an Ambitious Plan

EXECUTIVE SUMMARY

After years of public consultations, expert reports and attempts at reining in big tech through antitrust enforcement actions, the European Commission ("EC") has signaled that it will no longer rely solely on antitrust to provide a sufficiently robust approach to the problems that the EC sees in the markets in which big tech operates. The sweeping proposal, released on 15 December, 2020, includes an outright ban on certain practices (such as self-preferencing or misusing data collected from business users to gain an "unfair" competitive advantage) by digital "gatekeepers", such as GAFA, that have attracted antitrust scrutiny in the EU (and elsewhere). If the legislation is adopted in its proposed form, the EC would no longer have to prove that the relevant practices amount to an antitrust violation in order to impose penalties such as heavy fines and, as a last resort, ordering the break-up of the companies concerned.

In addition to these far-reaching rules for a narrowly defined group of the largest platforms, the EC has proposed content regulation, which aims at making "online intermediary services" more accountable for illegal and harmful content on their platforms. The content-related obligations differ depending on the online players' role, size and impact in the online ecosystem.

The EC's planned tech regulation is merely a legislative proposal, which still has to go through the EU the normal legislative process that is likely to take several years. For example, it took the EU four years to enact its current privacy law, the GDPR. However, the train has left the station and it appears inevitable that there will be platform-specific *ex ante* regulation. The only question is how far-reaching will it be.

In the meantime, several Member States (such as Germany) are adopting their own national rules to deal with platforms and fast-moving tech markets in general. This inevitably raises consistency concerns between national laws and any future EU regulation. Outside the EU, the EC's proposal will be studied carefully in a number of other countries, which may get "inspired" to adopt similar rules. The UK has also announced a new antitrust initiative that targets online platforms.

This leaves big tech with the prospect of a patchwork of platform laws and regulations in addition to continued antitrust enforcement actions across the globe. In this context, when finalizing the planned tech regulation, it will be important for the EU to be mindful of its role as "regulatory trendsetter", for example, by limiting the most stringent obligations to the largest platforms in narrowly defined circumstances.

OVERVIEW

On 15 December, 2020, the EC unveiled a package of legislative proposals comprising two draft regulations: the Digital Markets Act ("DMA"), and the Digital Services Act ("DSA"). The draft regulations are intended to update the existing tech regulatory framework and supplement the EC's *ex post* antitrust enforcement under Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU"). The DMA introduces *ex ante* regulation of the conduct of digital "gatekeeper" platforms, while the DSA focuses on making online companies more accountable for illegal and harmful content on their platforms.

The announcement follows a series of public consultations launched by the EC earlier this year, and more broadly seeks to address the criticism of the EC's recent investigations into "Big Tech" as lengthy and ineffective in addressing competition concerns in fast-moving digital markets. The proposals are intended to apply only to companies doing business in the European Economic Area ("EEA"), however the impact of the proposals on global tech regulation cannot be underestimated if other competition authorities follow the EU's example and adopt similar laws.[1]

The EC's draft regulations will now follow the EU's "ordinary" legislative procedure, which requires approval by both the European Parliament and the European Council. Given the far-reaching nature of the proposed regulations, the legislative process is likely to extend over several years – akin to the General Data Protection Regulation ("GDPR"), which entered into force four years after the EC's initial draft proposal. With the final form of the DSA and DMA yet to be determined by the legislators, we set out below a summary of the key provisions envisaged in the EC's draft regulations.

DIGITAL MARKETS ACT ("DMA")

The DMA seeks to establish harmonized *ex ante* rules prohibiting certain "unfair" practices by large online platforms acting as "gatekeepers" in markets for digital services. The DMA builds on the existing Platform-to-Business Regulation ("P2B Regulation"), which entered into force in July 2019,[2]

[1] For instance, shortly following the EC's announcement of the proposals, a senior official at the Japanese Fair Trade Commission ("JFTC"), the national antitrust enforcer in Japan, reportedly stated that the JFTC would examine the EU's draft laws for big technology companies as a reference when formulating its own endeavors to regulate digital markets.

[2] The P2B Regulation, among others, prohibits certain unfair practices by online platforms, such as suspending or terminating accounts without valid justification or failing to give users' sufficient notice of account changes.

and the findings of the EU Observatory on the Online Platform Economy, an expert group tasked with monitoring the developments in the EU's online platform economy.[3]

A. SCOPE

Beginning in 2015 with the EC's online consultation, the proper definition of a platform has been front and center of the discussions around the scope of any future regulation in the EU. A significant number of online players were concerned that any overly broad platform definition would lead to over-regulation with a highly detrimental impact on innovation.[4]

These concerns have been taken into account by the EC and the proposed DMA now applies only to "core" platform services offered by digital "gatekeepers" to consumers in the EEA.[5] Companies satisfying the following cumulative criteria will be presumed to be "gatekeepers" and thus subjected to the obligations provided for in the DMA:

- Annual EEA turnover exceeding EUR 6.5 billion in the last three financial years or market capitalization exceeding EUR 65 billion in the last financial year;
- Providing a core platform service in at least three Member States, with more than 45 million monthly active end users and more than 10,000 yearly active business users in the EU in the last three financial years.

Companies will be required to self-assess and notify the EC within three months after satisfying these thresholds, and will have the opportunity to submit substantiated arguments to rebut the resulting presumption. Separately, the EC will also have the capacity to identify gatekeepers *ex officio* following a market investigation.

B. KEY OBLIGATIONS

The DMA prescribes a number of obligations on digital "gatekeepers" which are intended to proactively prevent certain types of conduct deemed as anti-competitive by the EC. Indeed, the EC's proposals seem to target practices which have been the subject of EC investigations in recent years,

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3 In July 2020, the Observatory published three progress reports identifying the key areas of focus for the EC's enforcement policy in relation to online platforms. The reports considered, among others, the appropriate metrics for assessing the economic significance of platforms and the power they have over their users; the impact of self-favoring by vertically integrated online platforms vis-à-vis their business users; and the importance of how data is generated, collected and used in the online platform economy.

4 See https://ec.europa.eu/digital-single-market/en/news/results-public-consultation-regulatory-environment-platforms-online-intermediaries-data-and.

5 Under the current draft of the DMA, "core platform services" are intended to cover online intermediation services (e.g., online marketplaces, app stores, etc.), online search engines, social networks, video sharing services, electronic messaging services, operating systems, cloud services and advertising services relating to the aforementioned services. Furthermore, the draft envisions a potential expansion of the list of covered services following a market investigation by the EC.

including for instance the recently announced probes into Apple's App Store-related practices[6] and Amazon's e-commerce business practices.[7]

The DMA seeks to proactively prevent such attempts at leveraging platform-based market power by imposing a range of reporting requirements on "gatekeepers" (including, among others, the obligation to regularly produce independently audited descriptions of consumer profiling techniques), and requiring them to abide by a series of obligations, including:

- Refraining from leveraging data obtained from their business users to gain competitive advantage;
- Providing business users with data generated by their activities on the platform;
- Allowing business users to conclude contracts with their customers outside the platform;
- Ensuring interoperability and switching with third-party software, applications and services; and
- Providing companies advertising on their platform with access to performance measuring tools and information necessary to independently ascertain the effectiveness of their ad campaigns.

Separately, the DMA imposes an obligation on "gatekeepers" to inform the EC of any intended M&A transactions, irrespective of whether they are notifiable to the EC or national antitrust authorities. The EC will also have the power to expand the list of the applicable obligations following a market investigation.

C. OVERSIGHT AND NON-COMPLIANCE

Given the cross-border nature of online platform services, the EC will have the power to enforce the DMA, and will be assisted by the new Digital Markets Advisory Committee, a body composed of representatives from the EU Member States tasked with issuing opinions on select EC decisions. The EC is reportedly planning to recruit up to 80 new staff specifically to work on the DMA investigations, and is budgeting for 10 on-site inspections per year.

The EC's monitoring and enforcement powers under the DMA closely resemble those already available to the EC for purposes of enforcing Articles 101 and 102 TFEU, including the ability to issue requests for information to market participants, conduct interviews and on-site inspections, and to impose interim measures in cases of urgency.

The penalties for "gatekeepers" failing to comply with the DMA obligations resemble those available to the EC through the enforcement of Articles 101 and 102 TFEU, and include fines up to 10% of the gatekeeper's worldwide turnover and periodic penalty payments up to 5% of the daily worldwide

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6 In June 2020, the EC opened antitrust probes into the restrictions imposed by Apple on users of the App Store. In particular, the EC is investigating the mandatory use of Apple's proprietary in-app purchase system when distributing paid digital content on iOS, and the restrictions preventing app developers from informing users of alternative purchasing options outside of Apple's ecosystem.

7 In November 2020, the EC issued a formal letter to Amazon laying out its objections to Amazon's use of non-public data gathered from independent sellers active on its platform to the benefit of Amazon's own retail business. Concurrently, the EC also announced a separate antitrust investigation into the possible preferential treatment of Amazon's own retail offers and of independent sellers which use Amazon's logistics and delivery services.

turnover. In cases of systematic non-compliance,[8] the EC may furthermore impose *"any behavioral or structural remedies which are proportionate (…) and necessary"*. As a rule of thumb, structural remedies will only be available if there is no equally effective behavioral remedy or the appropriate behavioral remedy is more burdensome than a structural one. Any fining decisions must be made within 12 months from opening of the investigation, extendable by up to six months based on objective grounds.

DIGITAL SERVICES ACT ("DSA")

The DSA seeks to update the existing regime in the e-Commerce Directive (2000) by establishing a uniform EU-wide framework on handling of illegal and potentially harmful content online and setting out the rules on the liability of online intermediaries for third-party content. The proposal would also complement the P2B Regulation which imposed a range of transparency obligations on online intermediaries specifically in relation to their business users.[9]

A. SCOPE

The DSA applies to all digital services that connect consumers to goods, services or content ("online intermediary services"), including internet service providers, cloud services, messaging systems, marketplaces or social networks. A subset of the obligations envisioned by the DSA is targeted at online platforms specifically, including social networks, content-sharing platforms, app stores, online marketplaces and online travel and accommodation platforms.

B. KEY PROVISIONS

The DSA lays out a baseline set of obligations for all online intermediary service providers, including:

- An obligation to include in their terms & conditions information on any potential restrictions on the use of their services;
- An obligation to comply with orders from competent authorities to delete illegal or harmful content;
- An obligation for online intermediaries established outside the EU to designate a legal representative in the EU who will be held liable for non-compliance under the DSA.

The draft proposals also envisage additional transparency obligations specifically for online platforms, which include producing detailed reports on their content moderation activities and providing explanations to users whenever their content is removed from the platform.

Very large online platforms with more than 45 million monthly users in the EU will be furthermore subject to a separate set of additional requirements, including, among others, obligations to:

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8 "Systematic non-compliance" arises where a gatekeeper has received at least three non-compliance or fining decisions in the past five years and, following a market investigation by the EC, has been found to have in the meantime further strengthened or extended its gatekeeper position (*e.g.*, by expanding in size, increasing its user base, or having a more "entrenched or durable market position").

9 The P2B Regulation seeks to protect business users of various online intermediation services (including for instance e-commerce marketplaces, price comparison tools, app stores, etc.) by imposing transparency obligations in relation to, among others, terms & conditions, ranking mechanisms, complaint-handling systems and data-handling practices.

- Analyze systemic risks arising from the use of their platforms and to put in place effective content moderation mechanisms to address them;
- Provide transparency on the main parameters of the decision-making algorithms used to offer content on their platforms (the rankings mechanism) and the options for users to modify those parameters;
- Establish and maintain a publicly available ad repository allowing users to examine how ads were displayed on the platform and how they were targeted.

Finally, the DSA attempts to modernize the fault liability regime for online intermediaries established by the e-Commerce Directive (2000). While the basic liability shield protecting online intermediaries from liability for content on their services remains unchanged, the draft regulation introduces comprehensive rules in relation to the notification and removal of illegal content. These include minimum requirements for allowing users to notify illegal content, transparency obligations in relation to any content takedown decisions, internal complaint-handling mechanisms as well as significant reporting obligations.

C. OVERSIGHT AND NON-COMPLIANCE

The DSA establishes new enforcement authorities both at the EU level (European Board for Digital Services) and at the national level (Digital Services Coordinators). While the obligations set out in the DSA are generally intended to be enforced at the national level, the rules applicable to very large online platforms will be monitored by the EC.

The DSA provides for fines of up to 6% of the annual turnover and for periodic penalty payments of up to 5% of the average daily turnover for online intermediaries which fail to comply with their obligations.

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